Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

E.W. JILES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the district court violate petitioner's Fifth and Sixth Amendment rights, as set forth in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), when it found facts by a preponderance of the evidence that increased petitioner's sentence by thirty months over the sentence he would have received based solely on facts that he admitted through his guilty plea?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND GUIDELINES PROVISIONS INVOLVED 1

INTRODUCTION 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

I. *JOHNSON* v. *UNITED STATES* ESTABLISHES THE PROPER STANDARD OF REVIEW 6

II. THE COURT SHOULD VACATE JILES' SENTENCE AND REMAND FOR FURTHER PROCEEDINGS CONSISTENT WITH *BLAKELY* 6

A. The District Court Committed Error 6

B. The District Court's Error Is "Plain" Under Current Law, Including *Blakely* 12

C. The District Court's Error Affects Jiles' Substantial Rights 12

D. The District Court's Error Seriously Affects the Fairness, Integrity, and Public Reputation of Judicial Proceedings 14

CONCLUSION 15

TABLE OF AUTHORITIES

CASES **Page**

Apprendi v. *New Jersey*,
530 U.S. 466 (2000) ..... *passim*

Beard v. *Banks*,
124 S. Ct. 2504 (2004) 7

Blakely v. *Washington*,
124 S. Ct. 2531 (2004) ..... *passim*

Clay v. *United States*,
537 U.S. 522 (2003) 7

Griffith v. *Kentucky*,
479 U.S. 314 (1987) 7

Johnson v. *United States*,
520 U.S. 461 (1997) 6, 11, 12, 13, 14

Mistretta v. *United States*,
488 U.S. 361 (1989) 9

Neder v. *United States*,
527 U.S. 1 (1999) 13

Stinson v. *United States*,
508 U.S. 36 (1993) 8, 9

Sullivan v. *Louisiana*,
508 U.S. 275 (1993) 13

United States v. *Ameline*, 2004 U.S. App. LEXIS 15031 (9th Cir. July 21, 2004) 6, 8

United States v. *Bartholomew*, 310 F.3d 912 (6th Cir. 2002), *cert. denied*, 537 U.S. 1177 (2003) 14

United States v. *Bennett*, 329 F.3d 769 (10th Cir. 2003) 4

United States v. *Booker*, 2004 U.S. App. LEXIS 14223 (7th Cir. July 9, 2004) 3, 8

United States v. *Cotton*, 535 U.S. 625 (2002) 12, 13, 14, 15

United States v. *Fredette*, 315 F.3d 1235 (10th Cir.), *cert. denied*, 538 U.S. 1045 (2003) 4

United States v. *Hammoud*, 2004 U.S. App. LEXIS 15898 (4th Cir. Aug. 2, 2004) (en banc) 8

United States v. *Mooney*, 2004 U.S. App. LEXIS 15301 (8th Cir. July 23, 2004) 8

United States v. *Olano*, 507 U.S. 725 (1993) 13

United States v. *Penaranda*, 2004 U.S. App. LEXIS 14268 (2d Cir. July 12, 2004) (en banc) 8

United States v. *Pineiro*, 2004 U.S. App. LEXIS 14259 (5th Cir. July 12, 2004) 8

United States v. *Pirani*, 2004 U.S. App. LEXIS 16117 (8th Cir. Aug. 5, 2004) 6, 13, 14

United States v. *Sullivan*, 255 F.3d 1256 (10th Cir. 2001), *cert. denied*, 534 U.S. 1166 (2002) 4

CONSTITUTION

U.S. Const. Amend. V ..... *passim*

U.S. Const. Amend. VI ..... *passim*

STATUTES, GUIDELINES, AND RULES

28 U.S.C. § 1254 1

28 U.S.C. § 1291 1

U.S.S.G. § 3A1.1(b) 2, 3

U.S.S.G. § 3B1.1(a) 2, 3

U.S.S.G. § 3E1.1 3

Fed. R. Crim. P. 11(c)(1) 3

PETITION FOR A WRIT OF CERTIORARI

E.W. Jiles petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals dismissing Jiles' appeal is unreported. App. 1a-6a. The district court's judgment and oral ruling on sentencing issues (App. 27a-39a) are unreported.

JURISDICTION

The court of appeals entered its order dismissing Jiles' appeal on May 14, 2004. App. 1a. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). The court of appeals had jurisdiction under 28 U.S.C. § 1291.

CONSTITUTIONAL AND GUIDELINES PROVISIONS INVOLVED

U.S. Const. Amend. V provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property without due process of law.

U.S. Const. Amend. VI provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and

district wherein the crime shall have been committed . . . .

U.S.S.G. § 3A1.1(b) provides:

(1) If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by **2** levels.

(2) If (A) subdivision (1) applies; and (B) the offense involved a large number of vulnerable victims, increase the offense level determined under subdivision (1) by **2** additional levels.

U.S.S.G. § 3B1.1(a) provides:

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by **4** levels.

INTRODUCTION

At petitioner Jiles' sentencing, the district court increased his offense level by four levels under U.S.S.G. § 3A1.1(b)(1) and (2) for a large number of vulnerable victims and another four levels under § 3B1.1 based on its finding that Jiles was an organizer or leader of criminal activity that involved five or more participants. Jiles did not admit the facts on which the court based the adjustments. The court (rather than a jury) found those facts, and it did so by a preponderance of the evidence (rather than beyond a reasonable doubt).

After the Tenth Circuit had dismissed Jiles' appeal and the time had run to seek rehearing, this Court decided *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). As discussed below, *Blakely* makes clear that the district court's factfinding violated Jiles' Fifth Amendment right to due process and his Sixth Amendment right to trial by jury. Because *Blakely* applies to cases pending on direct appeal, the Court should grant certiorari, vacate Jiles' sentence, and remand for further proceedings consistent with *Blakely*.[1]

STATEMENT OF THE CASE

Jiles pleaded guilty to a single count of conspiracy to commit money laundering. Neither the petition to enter plea of guilty nor the plea agreement--both dated February 28, 2003--contains an agreed or binding guidelines calculation under Fed. R. Crim. P. 11(c)(1)(B) or (C). App. 40a-66a. The petition does not mention any specific provision relating to the guidelines calculation, and the plea agreement contains only one such provision--a stipulation in paragraph 7 that Jiles is entitled to an adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1. App. 44a.

Over Jiles' objection, the final presentence report recommended a four-level adjustment under U.S.S.G. § 3A1.1(b)(1) and (2) for a large number of vulnerable victims and a four-level adjustment under § 3B1.1(a) for Jiles' role in

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[1] On August 2, 2004, the Court granted writs of certiorari in *United States* v. *Booker*, 2004 U.S. App. LEXIS 14223 (7th Cir. July 9, 2004), and another case raising the issue of *Blakely*'s application to the federal sentencing guidelines. We ask the Court to hold this petition until after the decision in *Booker* and the companion case.

the offense. The district court included these adjustments in calculating Jiles' guideline level. App. 28a-32a. At sentencing on September 25, 2003, the court set Jiles' offense level at 26 (with the four-level adjustments under §§ 3A1.1(b) and 3B1.1(a)) and imposed a sentence of 63 months incarceration. App. 35a-36a.

Jiles appealed. On May 14, 2004, the court of appeals dismissed the appeal under an appeal waiver provision in Jiles' plea agreement. App. 1a.

At the time of Jiles' sentencing, an unbroken line of cases from the Tenth Circuit and every other circuit to consider the issue held that factfinding by the district court under the federal sentencing guidelines did not violate the Fifth and Sixth Amendments under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), as long as the guidelines sentence did not exceed the statutory maximum sentence. *See, e.g., United States* v. *Bennett*, 329 F.3d 769, 778 (10th Cir. 2003); *United States* v. *Fredette*, 315 F.3d 1235, 1245 (10th Cir.), *cert. denied*, 538 U.S. 1045 (2003); *United States* v. *Sullivan*, 255 F.3d 1256, 1264-65 (10th Cir. 2001), *cert. denied*, 534 U.S. 1166 (2002). In light of this solid wall of authority, Jiles did not raise the *Apprendi* issue in the district court or in his pleadings before the court of appeals.

On June 24, 2004, this Court decided *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). *Blakely* applies *Apprendi* to a determinate sentencing scheme. As we discuss in more detail below, *Blakely* makes clear that judicial factfinding under the preponderance of the evidence standard that increases a defendant's sentence under the federal sentencing guidelines violates the defendant's Fifth Amendment right to due process and his Sixth Amendment right to trial by jury.

The waiver provision in Jiles' plea agreement that barred his appeal to the court of appeals does not apply to the *Blakely* issue that he presents to this Court. The waiver declares in part that Jiles' "waiver of rights to appeal and to bring collateral challenges shall not apply to appeals or challenges based on changes in the law reflected in Tenth Circuit or Supreme Court cases decided after the date of this agreement that are held by the Tenth Circuit or Supreme Court to have retroactive effect." App. 46a. Jiles' appeal to this Court is based on a change in the law reflected in the Court's decision in *Blakely*, which was decided after the date of the plea agreement. And, as discussed below, *Blakely* is retroactive to all cases, including Jiles' case, pending on direct appeal.[2/]

REASONS FOR GRANTING THE WRIT

The district court, rather than a jury, found facts by a preponderance of the evidence, rather than beyond a reasonable doubt, that increased Jiles' sentencing range from 27 to 33 months (offense level 18) to 63 to 78 months (offense level 26). App. 28a-32a. *Blakely* makes clear that the court's factfinding violated Jiles' Fifth Amendment right to due process and his Sixth Amendment right to trial by jury. Because Jiles' sentencing was clearly improper under *Blakely*, and because he is entitled to the benefit of that decision under settled retroactivity principles, the Court should grant certiorari, vacate Jiles' sentence, and remand for further proceedings consistent with *Blakely*.

[2/] To the extent there is any issue concerning the application of the appeal waiver provision to Jiles' *Blakely* issue, we ask that the Court remand to the court of appeals for consideration of the waiver question in the first instance.

I. *JOHNSON* v. *UNITED STATES* ESTABLISHES THE PROPER STANDARD OF REVIEW.

Because an unbroken line of decisions from the courts of appeals appeared to foreclose the *Apprendi* issue, Jiles did not raise that issue in the district court or on appeal to the Tenth Circuit. Thus, this Court's decision in *Johnson* v. *United States*, 520 U.S. 461 (1997), provides the appropriate standard of review. Under *Johnson*, an appellate court may reverse, despite the absence of an objection, if the district court's ruling constitutes "error"; the error is "plain" under current law, including *Blakely*; the error affects Jiles' "substantial rights"; and the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." 520 U.S. at 467 (quotations omitted).

II. THE COURT SHOULD VACATE JILES' SENTENCE AND REMAND FOR FURTHER PROCEEDINGS CONSISTENT WITH *BLAKELY*.

Under *Blakely* and *Johnson*, the Court should vacate Jiles' sentence and remand for further proceedings consistent with *Blakely*. *See United States* v. *Pirani*, 2004 U.S. App. LEXIS 16117 (8th Cir. Aug. 5, 2004) (reversing sentence under plain error standard and remanding for resentencing in light of *Blakely*); *United States* v. *Ameline*, 2004 U.S. App. LEXIS 15031 (9th Cir. July 21, 2004) (same). We address the four *Johnson* prongs in turn.

A. The District Court Committed Error.

This Court has held that "'a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review.'" *Johnson*, 520 U.S. at 467

(quoting *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987)). Because Jiles' petition for writ of certiorari is before this Court, his case is "pending on direct review." *See, e.g., Beard* v. *Banks*, 124 S. Ct. 2504, 2510 (2004); *Clay* v. *United States*, 537 U.S. 522, 527 (2003). Accordingly, *Johnson* and *Griffith* require application of *Blakely* retroactively to Jiles' case.

Blakely establishes that the district court erroneously usurped the role of the jury at sentencing. In *Blakely*, this Court reiterated its holding in *Apprendi* that "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Blakely*, 124 S. Ct. at 2536 (quoting *Apprendi*, 530 U.S. at 490). *Blakely* makes clear that the "statutory maximum" sentence is not--as the courts of appeals had concluded in upholding the district court's role under the federal sentencing guidelines--the maximum possible sentence that could be imposed under any set of facts. Instead, "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Id.* at 2537 (emphasis in original).

The Court underscored this point in the context of Blakely's sentence. Blakely pleaded guilty to the Class B felony of second-degree kidnapping and admitted the use of a firearm. Washington's sentencing guidelines establish a standard range of 49 to 53 months for the offense of second-degree kidnapping with a firearm. The guidelines permit an upward departure, however, if the sentencing court makes particular findings, including, for example, that the defendant acted with "deliberate cruelty." The state court made such a finding as to Blakely and sentenced him to ninety months imprisonment. Before this Court, the state argued that the

court's "deliberate cruelty" finding--and the resulting increase in Blakely's sentence--did not implicate *Apprendi*, because a Washington statute establishes a ten-year maximum sentence for Class B felonies and Blakely's sentence, even with the "deliberate cruelty" enhancement, fell below that statutory limit. *See id.*

The Court squarely rejected this argument. It found the relevant "statutory maximum" for *Apprendi* purposes to be 53 months--the maximum sentence the state court could have imposed under Washington law based solely on facts found by a jury or (as in Blakely's case) admitted by the defendant. Because the state court's "deliberate cruelty" finding increased Blakely's sentence over the 53 months that state law otherwise permitted the court to impose, the Court held that the finding could only be made by a jury beyond a reasonable doubt. *See id.* at 2537-38.

The Court's reasoning in *Blakely* leaves no doubt that the district court's findings concerning vulnerable victims and Jiles' role in the offense violated his Fifth and Sixth Amendment rights. *See, e.g., United States* v. *Mooney*, 2004 U.S. App. LEXIS 15301, at *39-*44 (8th Cir. July 23, 2004) (holding that *Blakely* applies to the federal sentencing guidelines); *Ameline*, 2004 U.S. App. LEXIS 15031, at *14-*27 (same); *United States* v. *Booker*, 2004 U.S. App. LEXIS 14223, at *2-*17 (7th Cir. July 9, 2004) (same).[3] Based on the

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[3] *But see United States* v. *Hammoud*, 2004 U.S. App. LEXIS 15898 (4th Cir. Aug. 2, 2004) (en banc) (*Blakely* does not invalidate sentence imposed under federal sentencing guidelines); *United States* v. *Pineiro*, 2004 U.S. App. LEXIS 14259 (5th Cir. July 12, 2004) (*Blakely* does not apply to the federal sentencing guidelines); *United States* v. *Penaranda*,

facts that Jiles admitted, the district court could have properly assigned him offense level 18. Absent additional factual findings, the court had no legal authority to impose a higher sentence and would have been reversed if it had done so. *See, e.g.*, *Stinson* v. *United States*, 508 U.S. 36, 42 (1993) (federal sentencing guidelines have the force of law).

Justice O'Connor's dissent in *Blakely* (joined on this point by Justice Breyer) makes explicit that the constitutional principles in that case apply squarely to the federal sentencing guidelines. Justice O'Connor rejected both grounds on which the United States, as amicus curiae, had "half-heartedly" sought to distinguish the federal guidelines from the Washington sentencing scheme. *Blakely*, 121 S. Ct. at 2548-50 (O'Connor, J., dissenting). First, Justice O'Connor found it "irrelevant to the majority's reasoning" that "the Federal Sentencing Guidelines are promulgated by an administrative agency nominally located in the Judicial Branch," because the guidelines "have the force of law," and "Congress has unfettered control to reject or accept any particular guideline." *Id.* at 2549 (citing *Stinson* and *Mistretta* v. *United States*, 488 U.S. 361, 393-94 (1989)).

Second, Justice O'Connor concluded that "[t]he structure of the Federal Guidelines does not, as the Government half-heartedly suggests, provide any grounds for distinction." *Id.* Indeed, Justice O'Connor noted that "[i]f anything, the structural differences that do exist [between the Washington scheme and the federal guidelines] make the Federal Guidelines more vulnerable to attack." *Id.* Justice

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2004 U.S. App. LEXIS 14268 (2d Cir. July 12, 2004) (en banc) (certifying to this Court issues concerning *Blakely*'s application to the federal sentencing guidelines).

O'Connor declared that "[i]f the Washington scheme does not comport with the Constitution, it is hard to imagine a guidelines scheme that would." *Id.* at 2550.

Even the United States, as amicus curiae in *Blakely*, tacitly conceded that a ruling striking down the Washington scheme would effectively eliminate judicial factfinding under the federal sentencing guidelines. At the beginning of its amicus brief, the government observed that "[a]lthough the Washington sentencing guidelines system differs in significant respects from the United States Sentencing Guidelines"--the differences that Justice O'Connor in her dissent found immaterial--"a decision invalidating judicial departure authority here could call into question the constitutionality of the federal Guidelines." *Blakely* v. *Washington*, No. 02-1632, Brief of the United States as Amicus Curiae Supporting Respondent at 1. The government added that "[a] ruling that *Apprendi* applies to the Washington Sentencing Guidelines could have serious ramifications, especially if"--as in fact happened--"the Court accepted petitioner's view that a defendant's maximum sentence under *Apprendi* must be determined according to the facts reflected in the jury verdict alone or the guilty plea. . . . Such a ruling could apply to a host of determinations under the United States Sentencing Guidelines that depend on judicial fact-finding." *Id.* at 9 (quotations omitted).

The government expanded this point later in its brief. It declared:

> A holding that *Apprendi* applies to the departure determination in this case would raise the question whether *Apprendi* also applies to departure determinations in other guidelines systems. Even more substantial questions would arise if the Court rules that *Apprendi*

> applies here based on petitioner's theory that the statutory maximum for purposes of *Apprendi* is the punishment that would be imposed without any findings of fact other than the facts reflected in the jury verdict alone or the guilty plea alone. . . . If the "facts reflected in the jury verdict alone" are the elements of the offense, petitioner's theory would mandate the application of *Apprendi* to any facts, other than the offense elements, that increase the defendant's punishment.
>
> Such a rule would have profound consequences for the federal Guidelines. . . . [F]acts other than the elements of the offense enter into almost all of the calculations under the Guidelines, beginning with the most basic calculations for determining the offender's presumptive sentencing range. A decision in favor of petitioner could thus raise a serious question about whether *Apprendi* applies to myriad factual determinations under the Guidelines.

Id. at 25-26 (quotations omitted).

As the government anticipated, *Blakely* adopted the view that "the statutory maximum for purposes of *Apprendi* is the punishment that would be imposed without any findings of fact other than the facts reflected in the jury verdict alone or the guilty plea alone." *Id.*; *see Blakely*, 124 S. Ct. at 2536-43. And, as the government acknowledged, the view that the Court adopted "mandate[s] the application of *Apprendi* to any facts, other than the offense elements, that increase the defendant's punishment." In this case, those "facts, other than the offense

elements, that increase the defendant's punishment" include the facts underlying the vulnerable victims and role in the offense adjustments.

B. The District Court's Error Is "Plain" Under Current Law, Including *Blakely*.

Under *Johnson*, the district court's error must be "plain"--meaning "clear" or "obvious"--under "current law." *Johnson*, 520 U.S. at 467. *Johnson* explains that "in a case such as this--where the law at the time of trial was settled and clearly contrary to the law at the time of appeal--it is enough that the error be 'plain' at the time of appellate consideration." *Id.* at 468; *see United States* v. *Cotton*, 535 U.S. 625, 632 (2002) (same).

When Jiles was sentenced on September 25, 2003, every federal circuit to consider the issue had held that judicial factfinding under the federal sentencing guidelines did not violate the Fifth and Sixth Amendments under *Apprendi* as long as the sentence did not exceed the maximum sentence for the offense under any possible set of facts. Under *Blakely*, however, it is now both "clear" and "obvious" that the district court's fact findings concerning vulnerable victims and role in the offense violated Jiles' Fifth and Sixth Amendment rights. Thus, Jiles satisfies *Johnson*'s second prong.

C. The District Court's Error Affects Jiles' "Substantial Rights."

Under the third *Johnson* prong, Jiles must show that the district court's error affected his "substantial rights." *Johnson*, 520 U.S. at 468-69 (discussing but not deciding issue); *see Cotton*, 535 U.S. at 632-33 (discussing but not deciding issue in context of *Apprendi* indictment claim). To

meet this requirement the appellant usually must establish that the error "affected the outcome of the district court proceedings." *United States* v. *Olano*, 507 U.S. 725, 735 (1993); *see, e.g., Cotton*, 535 U.S. at 632. For so-called "structural errors," however--errors that "affect[] the framework within which the trial proceeds, rather than simply an error in the trial process itself," *Neder* v. *United States*, 527 U.S. 1, 7 (1999) (quotation omitted)--no such showing is necessary; structural errors "'can be corrected regardless of their effect on the outcome.'" *Cotton*, 535 U.S. at 632 (quoting *Olano*, 507 U.S. at 735). Regardless of whether a *Blakely* error is considered "structural," Jiles satisfies this prong of *Johnson*.

This Court has left unresolved whether *Apprendi* error is "structural." *Cf. Cotton*, 535 U.S. at 632 (declining to reach issue in context of *Apprendi* indictment error). But when the wrong factfinder--a judge rather than a jury--finds facts that dramatically increase a defendant's sentence by the wrong standard of proof--preponderance of the evidence rather than beyond a reasonable doubt--the error "affect[s] the framework within which the trial proceeds" and thus must be considered structural. *Sullivan* v. *Louisiana*, 508 U.S. 275, 281-82 (1993) (erroneous reasonable doubt instruction structural error not subject to harmless error review). If the district court's *Blakely* error is structural, as we contend, then Jiles satisfies the third *Johnson* prong without any further showing. *See, e.g., Cotton*, 535 U.S. at 632.

Even if the Court concludes that *Blakely* error is not structural, however, the district court's error affected Jiles' substantial rights. *See Pirani*, 2004 U.S. App. LEXIS 16117, at *35-*36. First, the error roughly doubled Jiles' sentence, in violation of his Fifth and Sixth Amendment rights. Without the improper judicial factfinding, the district court could not

have lawfully imposed a sentence greater than 33 months; with the error, the court sentenced Jiles to 63 months.

Second, as noted above, Jiles objected to the factual determinations at issue here and vigorously contested them, both in objections to the PSR and before the district court. The district court itself acknowledged that the vulnerable victims adjustment "is certainly not as clear cut as I had first thought." App. 28a. The evidence on the vulnerable victims and role in the offense adjustments was "neither overwhelming nor essentially uncontroverted." *United States* v. *Bartholomew*, 310 F.3d 912, 926 (6th Cir. 2002) (*Apprendi* error affected substantial rights), *cert. denied*, 537 U.S. 1177 (2003).

D. The District Court's Error Seriously Affects the Fairness, Integrity, and Public Reputation of Judicial Proceedings.

The district court's error--through which the wrong factfinder imposed an additional thirty months of imprisonment under the wrong standard of proof--"seriously affects the fairness, integrity, and public reputation of judicial proceedings" and thus satisfies the fourth *Johnson* prong. *Cotton*, 520 U.S. at 469; *see, e.g., Pirani*, 2004 U.S. App. LEXIS 16117, at *36; *Bartholomew*, 310 F.3d at 927.

In *Cotton*, this Court found that *Apprendi* indictment error did not seriously affect the fairness, integrity, and public reputation of judicial proceedings where the drug quantity evidence was "overwhelming" and "essentially uncontroverted." 535 U.S. at 633 (quotations omitted). This case bears no resemblance to *Cotton*. As discussed above, Jiles argued vigorously that the evidence did not justify the vulnerable victims and role in the offense adjustments. Had those adjustments been presented to a jury under the stringent

beyond a reasonable doubt standard of proof, the result might well have been different. Thus, unlike in *Cotton*, failure to correct the district court's plain error in this case would "seriously affect[] the fairness, integrity, and public reputation of judicial proceedings."

CONCLUSION

The petition for a writ of certiorari should be granted, Jiles' sentence should be vacated, and the matter should be remanded for further proceedings consistent with *Blakely*.

Respectfully submitted,

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August 2004

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. E. W. JILES, a/k/a Dub Jiles, Defendant - Appellant.	No. 03-6277

ORDER
Filed May 14, 2004

Before **SEYMOUR**, **BRISCOE** and **LUCERO**, Circuit Judges.

This matter is before the court on the government's Motion for Enforcement of the Plea Agreement and the defendant's response. *See United States v. Hahn*, 359 F.3d 1315, 1328 (10th Cir. 2004). We grant the government's motion and dismiss the appeal.

The defendant was convicted, pursuant to a guilty plea, of money laundering. The charges arose from a scheme in which the defendant bribed a state official to secure the transfer of nursing home residents from facilities which had been closed by the state to the defendant's facilities. The district court imposed a 2-level upward adjustment to the defendant's offense level for vulnerable victim under USSG § 3A1.1(b)(1), and sentenced the defendant to 63 months incarceration, the low end of the guideline range.

In spite of the waiver of appellate rights set forth in the plea agreement, the defendant filed this appeal, arguing that the district court erred in applying the vulnerable victim enhancement. The government moves for dismissal based on the waiver.

Under *Hahn,* 359 F.3d at 1325, to determine whether a waiver of appellate rights is enforceable, we review:

> (1) whether the disputed appeal falls within the scope of the waiver of appellate rights; (2) whether the defendant knowingly and voluntarily waived his appellate rights; and (3) whether enforcing the waiver would result in a miscarriage of justice. . . .

Having conducted that review, we conclude that the defendant's waiver is enforceable.

The defendant's contention that the district court erred in applying the vulnerable victim enhancement is clearly within the scope of the waiver. The defendant waived his right to appeal his "sentence as imposed by the Court and the manner in which the sentence is determined, provided the sentence is within or below the applicable guideline range determined by the Court to apply to this case, even if the Court rejects one or more of the positions of the United States or the defendant set forth [in this agreement] concerning the application of the U.S. Sentencing Guidelines."

The defendant also argues that the waiver was not knowing because the district court indicated at the change of plea hearing that the waiver applied to the conviction and did not state that the waiver applied to sentencing decisions. This argument is without merit.

The court looks at two factors when determining whether a waiver is knowing and voluntary: "whether the language of the plea agreement states that the defendant entered the agreement knowingly and voluntarily" and the "adequa[cy] of the Federal Rule of Criminal Procedure 11 colloquy." *Hahn*, 359 F.3d at 1325. "The defendant has the burden to present evidence from the record establishing that he did not understand the waiver." *United States v. Edgar*, 348 F.3d 867, 872-73 (10th Cir. 2003) (citing to *United States v. Vonn*, 535 U.S. 55, 59 (2002)). This court "consult[s] the whole record when considering the effect of any error on substantial rights." *Edgar*, 348 F.3d at 872 (citing to *Vonn*, 535 U.S. at 75).

Here, the plea agreement, in plain language, after setting forth the defendant's right to appeal the judgment and sentence, states that the defendant "knowingly and voluntarily waives his right to appeal or collaterally challenge" the conviction and sentence. The signature section of the agreement reads, "By signing this agreement, defendant acknowledges that he has discussed its terms with his attorney and understands and accepts those terms." The defendant also attested in his petition to enter a guilty plea that he had enough time to discuss his case with his attorney, and that he entered his guilty plea voluntarily. *See Edgar*, 348 F.3d at 872 (these facts were sufficient to show that the defendant had knowingly and voluntarily waived his right to appeal even though the district court did not discuss the waiver with him at all). In addition, the district court informed the defendant that he had the right to appeal and that he was giving up the right to appeal any errors the court may make.

The defendant also argues that enforcement of the waiver would constitute a miscarriage of justice because

the district court failed to comply with Rule 11 at the plea hearing and because the application of the vulnerable victim enhancement is grossly erroneous.

Under *Hahn,* the miscarriage of justice exception applies where: 1) "the district court relied on an impermissible factor, such as race;" 2) "ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid;" 3) "the sentence exceeds the statutory maximum;" and 4) "the waiver is otherwise unlawful." *Id.,* at 1327. In order to satisfy the last factor, "the error must seriously affect the fairness, integrity or public reputation of judicial proceedings, as that test is employed in *United States v. Olano,* 507 U.S. 725, 732 (1993) [defining plain error]." *Id.*

The first contention by defendant regarding a wholesale failure of the district court to comply with Rule 11 in its colloquy is totally without merit. The district court reviewed the waiver with the defendant and asked him if he understood its implications. The fact that the court indicated that the defendant was waiving his right to appeal his conviction and did not mention the sentence is of no consequence. In light of the record before this court, this omission did not seriously affect the fairness or integrity of the proceedings. *See Edgar,* 348 F.3d at 871 (failure to discuss waiver at all at the change of plea hearing in violation of Fed. R. Crim. P. 11 did not amount to plain error).

The second allegation, that the application of the vulnerable victim enhancement was so erroneous as to render the waiver unlawful, is also without merit. According to the defendant, there was no evidence to support the

court's conclusion that the nursing home residents were vulnerable victims.

The defendant, however, did not attach any portions of the district court record to support his arguments. This failure "raises an effective barrier to informed substantive appellate review." *McGinnis v. Gustafson,* 978 F.2d 1199, 1201 (10th Cir. 1992).

Moreover, even assuming that the defendant's contention that the district court erroneously applied the vulnerable victim enhancement, "this error does not seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Hahn,* 359 F.3d at 1329. The defendant bears the burden of persuading the court that the error meets this criterion. *See Vonn,* 535 U.S. at 63 (on plain error review, the defendant has the burden to persuade the court that the error "seriously affected the fairness, integrity or public reputation of judicial proceedings.") (internal quotations omitted). "In order to invoke the exception the error must be *particularly egregious." United States v. Brown,* 316 F.3d 1151, 1161 (10th Cir. 2003) (quotation and citation omitted) (emphasis in the original).

The argument presented by the defendant is not different from the type typically raised in challenges to sentencing where no appellate waiver has been signed. The defendant merely challenges the district court's findings and conclusions and the bases for them. *See, e.g., United States v. Janusz,* 135 F.3d 1319, 1325 (10th Cir. 1998) (defendant argued that there was no nexus between the victim's vulnerability and the crime's ultimate success). The defendant's sentence was well within the statutory maximum of 20 years, as recognized in the plea agreement. The defendant also recognized in the agreement that the

district court had the authority and jurisdiction to impose any sentence within the statutory maximum.

Accordingly, we hold that the defendant's waiver of appellate rights is enforceable and **DISMISS.** The mandate shall issue forthwith.

Entered for the Court
PATRICK FISHER, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs. CASE NO. CR-02-29-C

E. W. "DUB" JILES,

Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
MONDAY, MARCH 3, 2003
BEFORE THE HONORABLE ROBIN J. CAUTHRON,
CHIEF JUDGE PRESIDING

CHANGE-OF-PLEA HEARING

APPEARANCES:

MR. ROBERT McCAMPBELL, U.S. Attorney, Oklahoma City, Oklahoma, appeared on behalf of the plaintiff.

MR. NICK LILLARD and MS. KERRY KELLY, Assistant U.S. Attorneys, Oklahoma City, Oklahoma, appeared on behalf of the plaintiff.

MR. CARL HUGHES, MR. KYLE GOODWIN and MR. SAM GUIBERSON, Attorneys at Law, Oklahoma City, Oklahoma, appeared on behalf of the defendant.

[2] PROCEEDINGS:

THE COURT: This is case number criminal 02-29-C, United States vs. E. W. "Dub" Jiles.

Counsel, make your appearances, please.

MR. LILLARD: Yes, Your Honor. Nick Lillard for the United States, with co-counsel, Kerry Kelly, and the

United States Attorney Robert McCampbell present along with the agents from the FBI and the IRS.

MR. HUGHES: Carl Hughes for the defendant along with co-counsel Kyle Goodwin and Sam Guiberson. The defendant is also present in person, Your Honor.

THE COURT: Mr. Hughes, would you and Mr. Jiles come to the podium, please.

Are you E. W. "Dub" Jiles?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Mr. Jiles, you stand charged here by way of indictment charging numerous counts against you. At an earlier time you appeared before a United States Magistrate Judge and entered a plea of not guilty to all counts contained in the indictment. Do you recall that proceeding?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you recall that at that time it was explained to you that you have the right to remain silent and the right to have counsel present at all critical stages of the [3] proceeding?

THE DEFENDANT: Yes.

THE COURT: I am informed that you appear here with the intent to change your plea as to Count 9 of the indictment.

Mr. Lillard, I'll ask you to state the substance of the charge and the punishment provided by law.

MR. LILLARD: Yes, Your Honor.

Count 9 of the indictment alleges a conspiracy to commit money laundering between Mr. Jiles and Mr. VanMeter. The underlying money laundering offense is 1956(a)(1)(B)(i) which is basically conspiracy to conduct financial transactions using, in this case, bribe money, and the transactions – knowing the transactions were for the purpose of concealing the source and the fact of the bribes. The indictment alleges the SUA, or Specified Unlawful Activity, to be Count 8 in this particular case.

The bribes or transactions were given in exchange for preferential treatment primarily in the area of appointment of temporary managerships from – to Mr. VanMeter by Mr. Jiles.

The overt acts are spelled out in the conspiracy count and chief of those focus on July 15th, 1999 which is a day in which the defendants, Mr. Jiles and the co-conspirator VanMeter, actually traveled to a post office box at – I think it was Village – or Branch Village, Village Branch –

MR. HUGHES: That's right.

[4] MR. LILLARD: – and opened a P.O. box and then went to First Fidelity, where Mr. Jiles banked, and introduced Mr. VanMeter to a representative there for the purpose of purchasing a cashier's check which was then deposited into a KIS account at KIS Futures, a trading account where Mr. Jiles also had a trading account and where Mr. Jiles introduced Mr. VanMeter to his representative, Mr. Broadbent. That was all for the purpose of using the KIS account to launder this bribe money and to conceal the fact that the bribes were from Mr. Jiles and to give the money going into it the air of legitimacy, that is,

make it appear to be Mr. VanMeter's legitimate investment money. That, of course, is a violation of 1956(h), as alleged.

The punishment for that, Your Honor, carries up to 20 years. It also is a fine of up to $500,000, or both such fine and imprisonment. Upon conviction, there could be a mandatory special assessment of $100, as well as a period of supervised release of not greater than three years. If Mr. Jiles was convicted and placed on supervised release, a revocation of the terms of the supervised release could lead up to an additional two years imprisonment above the maximum.

THE COURT: Thank you, Mr. Lillard.

Mr. Jiles, I'll ask you, having in mind the rights that were earlier explained to you and the nature of the offense contained in Count 9 and the punishment provided by law, is it [5] your intent at this time to change your plea as to Count 9?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And how do you wish to plead as to Count 9 of the indictment?

THE DEFENDANT: Guilty.

THE COURT: Before I will accept your plea, Mr. Jiles, I must be satisfied that it's entered knowingly and voluntarily and I'm going to ask you a series of questions in that regard. I'll ask first that you raise your right hand and be sworn to testify truthfully.

(DEFENDANT SWORN)

THE COURT: Mr. Jiles, I have before me a Petition to Enter Plea of Guilty which appears to bear your signature on page 11. Do you have a copy of this in front of you, sir?

THE DEFENDANT: Yes, I do.

THE COURT: Is this your signature on page 11?

THE DEFENDANT: Yes, it is.

THE COURT: This form has been recreated on a word processor. I presume Mr. Hughes or someone from his office actually completed this form and not you; is that correct?

THE DEFENDANT: I think it was completed originally in pencil and then reduced to typewritten.

THE COURT: All right. Did you understand the questions that were asked of you in this form?

THE DEFENDANT: Yes, I did.

[6] THE COURT: And were your answers truthful?

THE DEFENDANT: Yes, they were.

THE COURT: Did you review this before you signed it to make sure these were, in fact, your answers?

THE DEFENDANT: Yes, I did.

THE COURT: All right. Mr. Jiles, I'm going to go through some of these with you now.

Have you ever been under the care of a physician or in the hospital for treatment of any mental or emotional condition?

THE DEFENDANT: No, ma'am.

THE COURT: For the treatment of any drug or alcohol use?

THE DEFENDANT: No, ma'am.

THE COURT: Are you at this time under the influence of any drug, whether prescription or otherwise?

THE DEFENDANT: (DEFENDANT SHAKES HEAD)

THE COURT: Are you taking any prescription or other medication?

THE DEFENDANT: Allergy medicines, basically.

THE COURT: Have you taken that today?

THE DEFENDANT: No, ma'am. Only every two weeks.

THE COURT: I'm sorry?

THE DEFENDANT: Every two weeks is all.

THE COURT: Does that medication have any interference with your ability to think clearly and make [7] decisions?

THE DEFENDANT: I don't think so; no, ma'am.

THE COURT: Are you under the influence of alcohol at this time?

THE DEFENDANT: No, ma'am.

THE COURT: Have you told Mr. Hughes all that you think he needs to know to counsel and assist you in this case?

THE DEFENDANT: I believe I have, yes.

THE COURT: Are you satisfied with his services?

THE DEFENDANT: Yes, ma'am.

THE COURT: Mr. Jiles, there is a record being made of my questions and your answers and it's important that our record be clear. If you would let me finish my question before you answer it, and make sure that your answer is loud enough for me and the court reporter to hear. Will you do that?

THE DEFENDANT: Yes, I will.

THE COURT: Also, if there's ever a question you don't understand, please stop me and ask me to explain it or ask Mr. Hughes for help. But I don't want you answering a question unless you're satisfied you understand it. All right?

THE DEFENDANT: Yes.

THE COURT: Mr. Jiles, anytime you're charged with an offense against the laws of the United States, you are entitled to certain rights. Among these are the right to a speedy and public trial by jury; the right to the assistance of an [8] attorney and to have one appointed for you at no charge if you can't afford one. You have the right to see and hear and cross-examine those witnesses presented against you by the government, as well as the right to use the power and process of this court to compel evidence and

witnesses on your own behalf. You may not, however, be compelled to incriminate yourself, and that means you can't be forced to take the stand and testify. If you don't testify, no inference of guilt can be drawn from that fact. Finally, you have the right to require that the government prove your guilt beyond a reasonable doubt to the satisfaction of a unanimous 12-person jury. Do you understand these rights?

THE DEFENDANT: Yes, I do.

THE COURT: And do you understand that by pleading guilty you are waiving or giving up each one of those rights?

THE DEFENDANT: Yes, I do.

THE COURT: And you know there will be no further trial of any kind, whether before a judge or a jury?

THE DEFENDANT: Yes, I do.

THE COURT: Mr. Jiles, you've heard Mr. Lillard state the maximum punishment involved. You indicate you understand that in the Petition to Enter Plea of Guilty as well. You know that the offense provides for a punishment up to 20 years imprisonment and it can also include a substantial fine. If you are sentenced to a term of imprisonment, a period of time [9] following your imprisonment called supervised release will also be imposed. That is exactly what it sounds like, it's a period of time during which you are supervised by a probation officer, certain conditions are placed on your behavior. I need you to understand that if you violate any of those terms of supervised release, that term can be revoked and that could result in additional time in prison over and above what is originally imposed at sentencing. Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: There will be a special assessment in the amount of $100. You indicate in your Petition to Enter Plea that you will also be forfeiting property.

Mr. Lillard, is this part of the indictment or is this part of the plea agreement?

MR. LILLARD: It's part of both, Your Honor. It's Count – I don't know if it's number 10. It's a forfeiture count in the indictment, which is the last count in the indictment, as well as part of the plea agreement. It's spelled out specifically, by way of explanation, the amount being forfeited is the balance of the money going into the KIS account which is not part of that being forfeited by co-defendant Brent VanMeter. Does that make sense?

THE COURT: The forfeiture count is not in a separate count, it follows Count 9 –

MR. LILLARD: Right.

[10] THE COURT: – and it alleges the sum of $18,800 as forfeitable. The amount mentioned in the Petition to Enter Plea is $4,046.50.

MR. LILLARD: That's correct. That is the amount – that is the balance of the amount of that $18,800 that Mr. VanMeter is actually being held accountable pursuant to his plea agreement for 14,000, whatever it is. The 4,000 for Mr. Jiles is the balance of that amount –

THE COURT: All right.

MR. LILLARD: – and represents the total proceeds going into KIS.

THE COURT: The total amount alleged in the indictment will be forfeited by one or the other, by someone, by the two of them?

MR. LILLARD: Yes, ma'am.

THE COURT: Mr. Jiles, I may have made that more confusing than it needed to be but I just want to make sure that the $4,046.50, which you indicate in your Petition to Enter Plea will be forfeited by you at time of sentencing, that is part of the sentence in this case. Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: Now, as I expect you know, sentencing in this court is governed by the United States Sentencing Guidelines, and I expect Mr. Hughes and perhaps others have made some prediction to you about the effect of the guidelines [11] on your particular case. I am not going to go through the entire system of sentencing but there are a couple of things I want you to understand in connection with the entry of your plea of guilty.

Under our system of sentencing, your case will be referred to the probation office for the preparation of a presentence report. That report is required by law to contain certain kinds of information both about you and about this particular offense. Based on that information, the probation officer will recommend a total offense level and a criminal history category. Those two numbers will determine your resulting guideline range.

What I want you to understand is that even though this plea is being entered pursuant to a plea agreement, there may be agreements between you and the government regarding certain components of sentencing, those

agreements are not binding on me or on the probation officer. Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: Further, although Mr. Hughes or others may have predicted to you what your guideline range will be, that too is not binding on the probation officer or on me. And if the guideline range comes out different than you expect it, that alone will not give you the right to withdraw the guilty plea that you're entering today. Do you understand that?

THE DEFENDANT: Yes.

[12] THE COURT: I further would explain to you that the total offense level can rely, in part, on what's called relevant offense conduct. That means any illegal conduct reasonably related to this offense of conviction can be used against you to determine your sentence. That means that even though counts are being dismissed pursuant to the plea agreement, they can still be used against you to determine your sentence. Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: And, finally, as you may be aware, I can depart under certain circumstances either upward or downward from the guideline range, so there is simply no guarantee as you stand here today what your sentence will be. Do you agree with that?

THE DEFENDANT: Yes, ma'am.

THE COURT: Mr. Jiles, are you pleading guilty because you are guilty?

THE DEFENDANT: Yes, ma'am.

THE COURT: Has anyone threatened or coerced you to get you to plead guilty today?

THE DEFENDANT: No, they haven't, Your Honor.

THE COURT: There is a written plea agreement which is attached to the Petition to Enter Plea.

Mr. Lillard, I'll ask you to state the substantive portions of the agreement.

[13] MR. LILLARD: Yes, Your Honor. The Court has already mentioned the forfeiture provision which appears on page 4. There is also a waiver of appeal under limited circumstances on page 7 of the plea agreement. And then, finally, in exchange for Mr. Jiles' plea to Count 9, the government has agreed to dismiss the remaining counts as to him which are Counts 1 through 6 and 8 of the indictment at sentencing, and has agreed that there will be no additional prosecution as to Mr. Jiles for any conspiracy entered into with Mr. VanMeter during the period of the indictment and within the scope of the indictment.

THE COURT: Mr. Lillard, do you anticipate that the government will argue restitution is appropriate in this case?

MR. LILLARD: It's not applicable in this case in our opinion, Your Honor.

THE COURT: All right. Mr. Jiles, you've heard Mr. Lillard state what he considers to be the substantive

portions of the agreement. Do you agree with his summary?

THE DEFENDANT: Yes, I do.

THE COURT: I want to emphasize to you that any agreement on which you base your decision to enter a plea of guilty must be in this written agreement or stated to me here in open court or it will never be enforceable against the government. So it's important that if any other promise has been made to you, whether directly or by implication, if it is [14] the reason you enter your plea, you need to tell me about it here today. Is there anything else not included in the written plea agreement?

THE DEFENDANT: There are not, Your Honor.

THE COURT: Under this agreement, you are agreeing to plead guilty to Count 9, the government will dismiss remaining counts. You are further agreeing to the forfeiture that we have discussed. The government is agreeing that you will be entitled to acceptance of responsibility. I see no other agreements regarding sentencing factors; is that correct, Mr. Lillard?

MR. LILLARD: That is correct, Your Honor.

THE COURT: You understand, as I told you, Mr. Jiles, that that is not necessarily binding on me, the finding that you have accepted responsibility. It will simply be your position and the government's position. I may find otherwise at sentencing. Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: I want to emphasize to you that you are giving up a very important right, that is, your right to appeal and bring a collateral challenge to this conviction. What that means is that if I should make an error of law or otherwise somewhere in this case, you are giving up your right to take that to a higher court and ask that it be corrected. You're also giving up your right to come back to me sometime later and [15] ask me to correct it by way of habeas corpus or collateral challenge. The government is giving up its right, and there are certain limits, certain conditions to that, but it's an important right that I want to emphasize to you. Is it your desire and intent to waive your right to appeal?

THE DEFENDANT: Yes, it is.

THE COURT: Mr. Hughes, do you agree that what we've discussed are the only substantive portions of the plea agreement?

MR. HUGHES: Yes, Your Honor, I do.

THE COURT: Mr. Jiles, I will remind you that you are under oath and subject to the penalties of perjury.

Mr. Lillard, I'll direct that you ask the questions necessary to establish a factual basis to the charge.

MR. LILLARD: Thank you, Your Honor.

Mr. Jiles, during the period of April 1st, 1999 to May 31st of 2000, as Count 9 alleges, did you enter into a conspiracy with Mr. VanMeter to launder money through the KIS account?

THE DEFENDANT: The dates were when?

MR. LILLARD: April 1st, 1999, through May 31st of 2000.

THE DEFENDANT: Yes, sir.

MR. LILLARD: Okay. And in connection with that, did [16] you actually pay bribes to Mr. VanMeter in cash for favoritism in the temporary manager's appointment process?

THE DEFENDANT: I paid Mr. VanMeter money to effect appointments of temporary managers.

MR. LILLARD: Okay. Did you actually use the KIS account or did Mr. VanMeter – was it part of the conspiracy that you use the KIS account to launder those monies and conceal the fact that the source of the deposits into KIS were bribes?

THE DEFENDANT: Yes.

MR. LILLARD: Okay. Did you enter into this conspiracy knowingly and did you take part in it voluntarily?

THE DEFENDANT: Yes.

MR. LILLARD: Okay. And at the time that this particular conspiracy started, did you realize or did you appreciate that the purpose of the conspiracy was to use the KIS account to conceal or hide the source of these bribes?

THE DEFENDANT: Yes.

MR. LILLARD: And did you do that with the idea that the money going into KIS, vis-a-vis, a purchase

of cashier's checks, would be done to give that money an air of legitimacy?

THE DEFENDANT: Yes.

MR. LILLARD: As if it was Mr. VanMeter's individual money?

THE DEFENDANT: Yes.

[17] MR. LILLARD: Okay. And specifically with regard to the conspiracy, did you do acts which would facilitate the accomplishment of the conspiracy? In other words, did you do some things to advance the conspiracy? Let me give you an example.

Did you go to KIS and introduce him to Ms. Hubley where you had traded – or to First Fidelity? Did you go to First Fidelity with Mr. VanMeter?

THE DEFENDANT: Yes.

MR. LILLARD: Okay. And did you also introduce him to your banker so that he could purchase the first cashier's check?

THE DEFENDANT: Yes.

MR. LILLARD: Okay, And then did you proceed to go to KIS and introduce him to Mr. Broadbent?

THE DEFENDANT: Yes.

MR. LILLARD: And you had an existing relationship with Mr. Broadbent?

THE DEFENDANT: Yes.

MR. LILLARD: And you introduced Mr. VanMeter for the purpose of opening that KIS account?

THE DEFENDANT: Yes.

MR. LILLARD: Is that correct?

And in March of 1999, you again went to Bank of America with Mr. VanMeter and to KIS for the purpose of a deposit of [18] bribe money into the KIS account; is that true?

THE DEFENDANT: I guess. I'm sure it is.

MR. LILLARD: Okay. Your Honor, that's all the questions. I have one stipulation, Your Honor. The stipulation would be – well – and in connection with the bribes, I think this speaks for itself, Mr. Jiles, but at the time for the favors and the temporary manager's process, you knew Mr. VanMeter was the deputy commissioner of OSDH and could effect those appointments?

THE DEFENDANT: Yes

MR. LILLARD: And that was the favoritism that you sought with these bribes; is that true?

THE DEFENDANT: Yes.

MR. LILLARD: Okay. Your Honor, the stipulation we would enter into is in connection with the conspiracy, that the financial transactions involved effected interstate commerce for the purpose of the money laundering statute. I would offer that.

MR. HUGHES: We agree to that.

THE COURT: All right. I think that your questions establishing a factual basis to Count 9 also cover the forfeiture allegation in that the same money alleged in the

forfeiture allegation is that alleged in Count 9; is that correct, Mr. Lillard?

MR. LILLARD: Yes, Your Honor, that's the basis of [19] the forfeiture.

THE COURT: And Mr. Hughes, do you agree with that?

MR. HUGHES: I agree with that, Your Honor.

THE COURT: Mr. Jiles, do you have any question of me before I accept your plea of guilty?

THE DEFENDANT: No, Your Honor.

THE COURT: I find, based on your clear and responsive answers to my questions and those of counsel, that you are competent to enter this plea and that you do so voluntarily and knowingly, that is, with full understanding of the rights that you're giving up. I will find you guilty as charged in Count 9 of the indictment and the forfeiture allegation and I will refer your case to the probation office for the preparation of a presentence report. I'm sure you understand from my discussion with you the importance of your full cooperation with the probation officer.

THE DEFENDANT: Yes, ma'am.

THE COURT: I am approving the written waiver of jury trial which has been signed by you and all counsel.

I have a written report from pretrial services, and I don't know if counsel received a copy of this. It was emailed to me shortly before coming in. Do you have it?

MR. LILLARD: Yes, ma'am, I do.

THE COURT: Mr. Hughes, do you?

MR. HUGHES: We have it, Your Honor. We've reviewed [20] it.

THE COURT: The recommendation, of course, is that Mr. Jiles be permitted to remain on his previously imposed conditions. Is there any request to the contrary, Mr. Lillard?

MR. LILLARD: No, Your Honor.

THE COURT: Mr. Hughes, any request for modification on your part?

MR. HUGHES: No, Your Honor.

THE COURT: Mr. Jiles, you have been on pretrial release conditions for quite sometime. These conditions will continue to apply pending sentencing. It's important, as it has been, however, for you to fully comply with each and every condition because your failure to do so could result in the revocation of those release conditions and your detention pending sentencing.

I'm not going to set a date for sentencing. I'll await receipt of the presentence report. I can tell you it will be in roughly 90 days or I would think no sooner than 90 days from now.

Is there anything further from counsel? Mr. Lillard?

MR. LILLARD: Not by the United States, Your Honor.

THE COURT: Mr. Hughes?

MR. HUGHES: Not from the defendant, Your Honor.

THE COURT: We'll be adjourned.

(PROCEEDINGS CLOSED)

[21] REPORTER'S CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

4-2-03 /s/ Greg Bloxom
Date Greg Bloxom

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs. CASE NO. CR-02-29-C

E. W. "DUB" JILES,

Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
THURSDAY, SEPTEMBER 25, 2003
BEFORE THE HONORABLE ROBIN J. CAUTHRON,
CHIEF JUDGE PRESIDING

SENTENCING HEARING – VOLUME III OF III

APPEARANCES:

MS. KERRY KELLY and MR. ROSS N. LILLARD, III, Assistant U.S. Attorneys, Oklahoma City, Oklahoma, appeared on behalf of the plaintiff.

MR. CARL HUGHES, MR. SAM GUIBERSON, MR. KYLE GOODWIN and MR. JEB JOSEPH, Attorneys at Law, Oklahoma City, Oklahoma, appeared on behalf of the defendant.

* * *

[408] do under those circumstances would be to stand on our brief as to the cases too. But I just wanted to point out those few issues that I think are of some significance and I hope I did.

Thank you.

THE COURT: In dealing only with the vulnerable victim enhancement, and that amounts to two separate questions, whether there was a vulnerable victim, and, secondly, whether there was a large number of vulnerable victims, it seems absurd or it did to me when I first saw the objection to this enhancement, it seems absurd to think that the population of nursing homes is not vulnerable. Having read the cases that you have each cited in your briefs on this issue, and listening to the evidence, it is certainly not as clear cut as I had first thought but, nonetheless, I believe that the enhancement must apply in this case.

We've heard testimony of specific harm to specific people who were vulnerable at the time the harm was done. The harm was done as part of the criminal conduct in this case, and I don't think there's any dispute that relevant conduct comes into the picture in applying this enhancement. It is not just the money laundering to which Mr. Jiles has pled guilty but also the entire criminal scheme about which we have heard so much.

And in that scheme, closings occurred. They occurred through no fault of Mr. Jiles. They would have occurred [409] whether he was bribing Mr. VanMeter or not. But when they occurred, the way they were handled was far different than they would have been handled had this bribery not been going on. Protocol was not followed. People were transferred at great distances away from the closed facility. Families were affected. Raymond Powell, the most obvious of these victims, I guess is lost to society forever, if not a long time, as a result of having been taken in a way that was not appropriate under the Department of Health's protocols.

I would note at this point that I find Mr. Pickert to be an entirely incredible witness and I don't give any credence to his testimony as to what occurred at the Stevenson's nursing home.

Other victims were identified as a result of transfers from closed facilities. Those are Chuck Cherry, Mr. McGaugh, and Mr. – I think you're saying Nephew but I'm not sure I have that name right. They suffered harm as a result of being transferred without notification to their relatives by being transferred to a facility far distant from where they began. Those are specifically identifiable victims, but there are certainly many other victims of the criminal conduct.

The people who were in Rosewood, which was not cleaned up as a result of the collusion between Mr. VanMeter and Mr. Jiles, that some months later was found to be the worst situation that the examiner had ever seen. Had Mr. VanMeter [410] and Mr. Jiles not been engaged in this criminal conduct, that Facility would have been cleaned up after its first survey.

The most compelling evidence of the vulnerability of the victims is the words that we heard from Mr. Jiles himself from the wiretap, and that – those are the people who were, in his words, to be warehoused or placed in holding pens or traded or hidden or swapped, all for the advantage of Mr. Jiles. Maybe some of those trades and swaps didn't happen but many of them did, and people were placed in situations that were completely inappropriate. They were – they were, as he said, warehoused in some situations.

It is hard not to look at the entire population of nursing homes in the State of Oklahoma as potential

victims of Mr. Jiles and Mr. VanMeter's conduct had it been allowed to continue.

Admittedly, the case law regarding the number of vulnerable victims is not extensive. There is no help in the commentary to the guidelines themselves regarding what is a large number, but I find that this is a large number and I overrule your objection.

The remaining objection is to the leadership role. Ms. Kelly, do you want to argue that specifically or rely on your brief?

MS. KELLY: We will rely on our brief, Your Honor.

THE COURT: Mr. Hughes?

[411] MR. HUGHES: The same, Your Honor.

THE COURT: Under the guidelines, a guideline sentence can be enhanced – must be enhanced if the defendant's role in the offense mandates it. Under Section 3B1.1, if the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, the offense level is increased by four. That is what the probation officer has recommended in this case and what a good bit of this evidence concerned.

Clearly, there were five – at least five people involved in the criminal scheme. They were Mr. Jiles himself, Mr. VanMeter, Judy Cochran and Karen Verner, who also received bribes from Mr. Jiles, Kitt Wakeley, who committed an offense that would have amounted to mail fraud by returning the insurance form indicating that he was the sole and only owner of MMGI. It seems to me from the evidence that Phyllis Murray and Merilyn Stelly and Ed

Lee could also be considered criminal participants, although apparently they have not been charged and I don't mean to conclude that they are but it certainly appears that they had knowledge of the illegal conduct that was going on at the time that it was happening.

But even limiting it to the five I originally named, the defendant's argument is that Mr. Jiles wasn't the leader because Mr. VanMeter was in charge of these Department of Health employees and that Mr. Jiles had to work through [412] Mr. VanMeter and, therefore, Mr. VanMeter is the leader and Mr. Jiles is in some sort of subleadership position. That is clearly belied again by Mr. Jiles' own words on the tapes that we heard here in court. He was directing Judy Cochran and Karen Verner in telling them exactly what to do and when and where and how. He directed Mr. VanMeter in the money laundering activities, to which he has pled guilty. He told aim exactly what to do, took him with him and did it with him. And clearly Kitt Wakeley, as an employee, was under his control and it was to Mr. Jiles that he reported and took directions. He was the leader and organizer. He obtained more benefit than anyone else. We've seen the extent of the income to Oak Hills and MMGI and Mr. Jiles and it's clear that the only income to Mr. VanMeter was the 18,800 that was the bribe money.

Under the factors that are listed in the commentary to Section 3B1.1, and under the evidence as it has been adduced here in this courtroom, it is clear to me that Mr. Jiles is a leader and organizer of a criminal activity involving five or more participants. It's not necessary in order to make this finding but I also find that the criminal activity was otherwise extensive from the list of people who were involved, the geographic area, the length of

time, the amount of money. This was certainly an extensive criminal activity, and for either reason the increase is justified. I therefore overrule your objection to this as well.

[413] In making those findings, I have, in effect, ruled on many of the other objections that you have to the presentence report. But to any other extent, I find that your other objections are not so much as to the facts reported by the probation officer but they are offering a different construction on those facts or offering a different set of facts to consider along with those in the report. I have read them carefully and I have considered them as balancing what's in the presentence report, but none of them will make any difference in my sentencing decision. And to the extent I haven't already made findings, I will not do so.

The remaining question then is the defendant's motion for downward departure. Well, let me ask you, Mr. Hughes. Are there any other objections in the addendum to the presentence report upon which you want a specific ruling?

MR. HUGHES: I don't believe so, in view of your comments just now.

THE COURT: All right. Then we reach the downward departure motion. Again, I have a memorandum from the defendant and one from the government. I noted as we started that I had received letters from certain people that the defendant was offering as part of this hearing. I have also received a number of other letters. I don't know the number. But Ms. Kelly, I'm assuming the government has received a copy of those as well?

[414] MS. KELLY: No, Your Honor. Judge, we did receive this. I thought you meant something different. I apologize.

THE COURT: Good. I thought you had.

Do either of you wish to make additional argument regarding a departure other than what's in your briefs? Mr. Hughes?

MR. HUGHES: Your Honor, I believe it's stated in our brief. We'll stand on that.

MS. KELLY: The government will rely on its brief, Your Honor.

THE COURT: Mr. Jiles argues several factors warrant a downward departure in this case. Unfortunately, I can't find where those arguments are made. What was the title of the brief that has those arguments, Mr. Hughes?

MR. HUGHES: We're looking, Judge.

THE COURT: Here it is. I found it. It's in your sentencing memorandum.

MR. GUIBERSON: There's also a memorandum on behalf of Dub Jiles regarding sentencing options and downward departure.

THE COURT: Yes, I have that one too. I just wanted to list your arguments. You put forth extraordinary family circumstances, the disparity of sentence between the co-defendant, Mr. Jiles' age, aberrant behavior, community service and other good works, and a combination of all of those [415] factors.

Clearly, as to family circumstances, it is almost always the family who suffers most when a criminal defendant is convicted and placed in jail. In this case, I certainly don't mean to diminish or downplay in any way the important role you've taken in the lives of your granddaughters and the good that you've done but there's no – there's nothing apparent to me or asserted in these briefs that makes that extraordinary.

In order to depart on any of the grounds that you have urged, I have to find that the circumstances are different and so much different that it takes your case out of the heartland of cases that the guidelines are intended to govern.

Your family circumstances, while compelling, are simply not so different from those of any criminal defendant being sentenced that they take it out of the heartland.

The disparity of sentence between you and your co-defendant is not an appropriate ground for departure, and there are good reasons for that disparity, in any event.

There is nothing shown about your age that transfers that to a health question or in any way makes it anything more than simply unpleasant in prison, and I assume that that would be true regardless of your age. There is nothing about that that takes this out of the heartland.

And I find this is not aberrant behavior. It went on too long, it was too extensive. And while none of your friends and [416] family may know about any similar conduct that occurred previously, you have been described in some of these letters as a hard businessman or in terms that lead me to believe that in your business life, at least, this may

not be aberrant at all. In any event, it doesn't qualify under my view of aberrant behavior.

And, finally, community service and other prior good works is simply not appropriate in this case. Your good works are to be admired and encouraged but they are not circumstances that take this out of the heartland of cases.

I decline to depart in this case for all of those reasons and I am ready to impose sentence unless counsel have any other rulings I need to make.

MS. KELLY: Nothing from the government.

THE COURT: Mr. Hughes, –

MR. HUGHES: Nothing from the defendant.

THE COURT: – I'll permit you and Mr. Jiles to make any statement you care to make before I impose sentence.

MR. HUGHES: Your Honor, I think we've made our statements. I have nothing further to add for the Court.

THE COURT: Mr. Jiles, do you wish to be heard?

THE DEFENDANT: No, Your Honor.

THE COURT: Would you stand, please.

MR. HUGHES: Judge, do you want us to come up here?

THE COURT: Not if you're not going to speak.

[417] After all of my rulings, the offense level remains 26, with a criminal history category of I, and that results

in a guideline imprisonment range of 63 to 78 months. While I believe that the factors that you urged in support of a downward departure are not sufficient for a departure, I do believe that those circumstances merit a sentence at the bottom of the guideline range. Even a sentence at the bottom is certainly a significant sentence in this case, and particularly to someone who has no prior criminal history, and I think given the goals of sentencing, as set out in the statute, that the bottom of the range is sufficient in this case.

It is therefore my judgment that you be sentenced to the custody of the Bureau of Prisons to be imprisoned for a term of 63 months. On release from imprisonment, you will be placed on supervised release for a term of two years. Within 72 hours of your release from the custody of the Bureau of Prisons, you must report in person to the probation office of the district to which you are released. While on supervised release, you will comply with all standard conditions which have been adopted by this court. You will not possess a firearm or any other destructive device, and you will comply with the following special conditions. You are ordered to complete 104 hours of community service within the first year of supervision as directed by your probation officer. I suspend the requirement for mandatory urine screening as dictated by [418] Section 3608, but I specifically retain the probation officer's authority to administer such test for cause as permitted by that statute and by the standard conditions of supervision.

Mr. Jiles, I advise you – I'm sorry, there is more.

According to the preliminary order of forfeiture, you will forfeit the sum of $4,046.50, and you will pay to the

United States a special assessment of $100, which is due and payable immediately.

I advise you that under your plea agreement you have waived your right of appeal except in certain very limited circumstances. To the extent that a right of appeal survives that waiver, you are advised that your appeal must be to the United States Court of Appeals for the Tenth Circuit. That if you can't afford the costs of an appeal, you may apply for leave to appeal informa pauperis, that is, without prepayment of costs and for preparation of transcript at government expense. If you wish to file an appeal, you must do so within 10 days of today's date or you may request that the clerk spread that of record at this time.

I am not imposing a fine in this case. I believe that in Mr. Jiles' circumstances a fine is not serious punishment but that the prison sentence that is imposed is and the prison sentence will be enough.

You have made a request for designation at I believe the Fort Worth medical facility?

[419] MR. HUGHES: That's correct, Your Honor.

THE COURT: I will include in my judgment that I recommend that facility if Mr. Jiles is eligible. I caution you, Mr. Jiles, that that's nothing more than a recommendation on my part. The Bureau of Prisons will be guided by their own needs, and certainly in the case of that recommendation by your health needs, but I will include it in my order.

I have a written recommendation from pretrial services that Mr. Jiles be permitted to self surrender. Is there any objection to that, Ms. Kelly?

MS. KELLY: Your Honor, the government does not object to that; however, we would request simply 30 days which is the standard. He's already had six months to prepare his affairs.

THE COURT: Yes. I'm not going to give you more than 30 days within which to self-surrender but I will permit you to report to the designated institution no later than Monday, 12 noon, on October 27th, 2003. Until that time, you remain on the same conditions of release which have previously applied to your conduct, and a violation of a single one of those conditions could result in your detention pending designation of institution.

If there is a financial condition which has been imposed, it will be exonerated at the time you report.

Is there anything else? Ms. Kelly?

[420] MS. KELLY: Nothing from the government.

THE COURT: Mr. Hughes?

MR. HUGHES: Your Honor, I just wanted to note for the record that the forfeiture money has been paid to the U.S. Marshal's Service and we showed the prosecutors a copy of that receipt. That has been done. The $100 special assessment will be taken care of before we leave court.

MS. KELLY: We have received that, Your Honor; however, I believe the judgment and conviction needs to note that.

THE COURT: Yes, it does need to be in the judgment, both of those payments.

MR. HUGHES: Judge, our scribe is not sure he wrote down the right date for reporting. Was it October 27th?

THE COURT: 27th. The 25th, which is 30 days, is a Saturday, so it is the 27th.

We'll be adjourned.

(PROCEEDINGS CLOSED)

REPORTER'S CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

11-14-03 /s/ Greg Bloxom
Date Greg Bloxom

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
-vs-	)	**No. CR-02-29-C**
E.W. "DUB" JILES,	)	
Defendant.	)	

PLEA AGREEMENT

Introduction

1. This document contains the entire plea agreement between defendant, E.W. "Dub" Jiles, and the United States through its undersigned attorney. No other agreement or promise exists, nor may any additional agreement be entered into unless in writing and signed by all parties. Any unilateral modification of this agreement is hereby rejected by the United States. This agreement applies only to the criminal violations described and does not apply to any civil matter or any civil forfeiture proceeding except as specifically set forth. This agreement binds only the United States Attorney's Office of the Western District of Oklahoma and does not bind any other federal, state or local prosecuting, administrative or regulatory authority. If defendant does not accept the terms of this agreement by February 28, 2003, the offer is withdrawn.

Guilty Plea

2. Defendant agrees to enter a plea of guilty to Count 9 of the Indictment in Case Number CR-02-29-C charging Conspiracy to Commit Money Laundering, in violation of Title 18, United States Code, Section 1956(h). To be found guilty of violating 18 U.S.C. § 1956(h), the defendant must admit that (1) he entered into a conspiracy as described in Count 9 of the Indictment; (2) he knew the essential objective of the conspiracy; (3) he knowingly and voluntarily became a part of the conspiracy; and (4) interdependence existed between conspirators. The objective of the conspiracy described in Count 9 involved – conducting financial transactions affecting interstate commerce, which transactions involved the proceeds of a specified unlawful activity, specifically bribery, knowing that the transactions were designed in whole or in part to conceal and disguise the nature, location, source, ownership and control of the proceeds of a specified unlawful activity, and while conducting such financial transactions knowing that the property involved in the financial transactions represented the proceeds of some form of unlawful activity.

Maximum Penalty, Restitution and Special Assessments

3. The maximum penalty which could be imposed as a result of this plea is twenty years imprisonment or a fine of $500,000.00, or both such fine and imprisonment, as well as a mandatory special assessment of $100.00, and a term of supervised release of three years.

4. In addition, the Court may consider whether restitution pursuant to 18 U.S.C. § 3663(a)(3) is appropriate.

5. Defendant agrees to pay the special assessment due the United States to the Office of the United States Court Clerk immediately following sentencing. Defendant understands that any fine or restitution ordered by the Court is immediately due unless the Court provides for payment on a date certain or in installments.

6. If the Court sentences defendant to a term of imprisonment which exceeds one year, the Court must also impose a term of supervised release, which the defendant will begin to serve after being released from custody. During the term of supervised release, the defendant will be subject to conditions which will include prohibitions against violating local, state or federal law, reporting requirements, restrictions on travel and residence, and possible testing for controlled substance use. If the defendant violates the conditions of his supervised release, the Court may revoke his supervised release, and sentence him to an additional term of imprisonment. This additional term of imprisonment would be served without credit for the time defendant successfully spent on supervised release. When combined, the original term of imprisonment and any subsequent term of imprisonment the Court imposes may exceed the statutory maximum prison term allowable for the offense.

FORFEITURE

A. Defendant agrees to forfeit to the United States voluntarily and immediately all of his right, title and interest to any and all assets, specifically $4,046.50, which

are subject to forfeiture pursuant to 18 U.S.C. § 982(a)(1) or § 981(a)(1) which are in the possession and control of defendant or nominees.

B. Defendant agrees that such funds are traceable to a financial transaction which involved the proceeds of a specified unlawful activity as reflected in Count 9 of the Indictment.

C. Defendant agrees to fully assist the United States in the forfeiture of the listed assets and to take whatever lawful steps are necessary to pass clear title to the United States, including but not limited to surrender of title and execution of any documents necessary to transfer his interest in any of the above property to the United States, and assist in bringing any assets located outside the United States within the jurisdiction of the United States, and taking whatever lawful steps are necessary to ensure that assets subject to forfeiture are not sold, disbursed, wasted, hidden, or otherwise made unavailable for forfeiture.

D. Defendant knowingly and voluntarily waives his right to a jury trial on the forfeiture of assets. Defendant knowingly and voluntarily waives all constitutional, legal and equitable defenses to the forfeiture of these assets in any proceeding, and further waives any claim or defense under the Eighth Amendment to the United States Constitution, including any claim of excessive fine, to the forfeiture or disposition of assets by the United States, the State of Oklahoma or its subdivisions.

E. Defendant knowingly and voluntarily waives any right to appeal or collaterally attack any matter in connection with the forfeiture provided for herein.

F. Forfeiture of the defendant's assets shall not be treated as satisfaction of any fine, restitution, cost of imprisonment, or any other penalty this Court may impose upon the defendant in addition to forfeiture.

G. Defendant agrees not to contest or file a claim to the $14,753.50 being forfeited by his co-defendant in any civil proceeding, administrative or judicial, which may be initiated.

H. Defendant hereby waives his right to notice of any forfeiture proceeding involving the listed property, and agrees not to file a claim or assist others in filing a claim in that forfeiture proceeding.

I. In the event any claim is successfully made by third parties to any of the assets listed above, defendant agrees to forfeit substitute assets equal in value to those assets claimed by third parties.

Sentencing Guidelines

7. Based upon the information that is known to the parties on the date that this agreement is executed, the positions they expect to take at sentencing with respect to, the United States Sentencing Guidelines will include the following: defendant is entitled to acceptance of responsibility pursuant to §3E1.1.

The parties have entered into this plea agreement under the provisions of Rule 11(e)(1)(B). The defendant acknowledges and understands that the Court is not bound by, nor obligated to accept, these stipulations, agreements, or recommendations of the United States or the defendant. And, even if the Court rejects one or more of these stipulations, agreements, or recommendations,

that fact alone would not allow the defendant to withdraw his plea of guilty. It is the expectation of the United States that its criminal investigation of the defendant's conduct (as opposed to the wrongdoing of others) will cease upon the signing of this plea agreement. However, subject to the terms and conditions of this plea agreement (particularly the conditions concerning §1B1.8 set out in paragraph 11), the United States expressly reserves the right to take positions that deviate from the foregoing stipulations, agreements, or recommendations in the event that material credible evidence requiring such a deviation is discovered during the course of the United States' investigation subsequent to the signing of this agreement or arises from sources independent of the United States, including the U.S. Probation Office.

Waiver of Right to Appeal and Bring Collateral Challenge

8. Defendant understands that a sentencing guideline range for his case will be determined by the Court under the guidelines issued by the U.S. Sentencing Commission. Defendant also understands that the Court has jurisdiction and authority to impose any sentence within the statutory maximum for the offense(s) to which he is pleading guilty. Defendant further understands that Title 28, United States Code, Section 1291, and Title 18, United States Code, Section 3742, give him the right to appeal the judgment and sentence imposed by the Court. Acknowledging all this, defendant in exchange for the promises and concessions made by the United States in this plea agreement, knowingly and voluntarily waives his right to appeal or collaterally challenge:

a. Defendant's guilty plea and any other aspect of his conviction, including but not limited to any rulings on pretrial suppression motions or any other pretrial dispositions of motions and issues.

b. Defendants sentence as imposed by the Court and the manner in which the sentence is determined, provided the sentence is within or below the applicable guideline range determined by the Court to apply to this case, even if the Court rejects one or more of the positions of the United States or the defendant set forth in paragraph 7 concerning the application of the U.S. Sentencing Guidelines.

c. It is provided that (i) defendant specifically does not waive the right to appeal an upward departure from the sentencing guideline range determined by the Court to apply to this case, and (ii) his waiver of rights to appeal and to bring collateral challenges shall not apply to appeals or challenges based on changes in the law reflected in Tenth Circuit or Supreme Court cases decided after the date of this agreement that are held by the Tenth Circuit or Supreme Court to have retroactive effect.

9. The United States agrees to waive its right under 18 U.S.C. § 3742 to appeal the sentence imposed by the Court and the manner in which the sentence was determined, provided defendant's sentence is within the applicable guideline range determined by the Court to apply to this case. By this agreement, the United States specifically does not waive its right to appeal a downward departure from the sentencing guideline range determined by the Court to apply to this case.

Waiver of Claim to Prevailing Party Status

10. The defendant expressly acknowledges that he is not a "prevailing party" within the meaning of Public Law 105-119, section 617 ("The Hyde Amendment") with respect to the count of conviction or any other count or charge that may be dismissed pursuant to this agreement. If the defendant is represented by retained counsel, he voluntarily, knowingly, and intelligently waives any rights he may have to seek reasonable attorney's fees and other litigation expenses under the Hyde Amendment.

Obligations of the Defendant

11. It is understood that, should defendant commit any further crimes or should it be determined that he has knowingly given false, incomplete, or misleading testimony or information, or should he otherwise violate any provision of this agreement, the United States may declare this agreement null and void and prosecute defendant for any and all his federal criminal violations, including perjury and obstruction of justice. Any such prosecution that is not time-barred by the applicable statute of limitations on the date of the signing of this agreement may be brought against defendant, notwithstanding the expiration of the statute of limitations between the signing of this agreement and the commencement of such prosecution. Defendant hereby waives all defenses based on the statute of limitations with respect to any prosecution that is not time-barred on the date that this agreement is signed.

12. The parties also recognize that in the event it is determined that defendant has committed any further crimes, knowingly given false, incomplete, or misleading

testimony or information, or otherwise violated any provision of this agreement, (a) all statements made by defendant to the United States or other designated law enforcement agents, and any testimony given by defendant before a grand jury or other tribunal, whether prior to or subsequent to the signing of this agreement, and any leads from such statements or testimony shall be admissible in evidence in any criminal proceeding brought against defendant; and (b) defendant shall assert no claim under the United States Constitution, any statute, Rule 11(e)(6) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal rule or law that such statements or any leads therefrom should be suppressed. It is the intent of this agreement to waive all rights in the foregoing respects.

13. Defendant expressly agrees and understands that his provision of information and other cooperation referred to in this Section may occur when defendant's attorney is not present. However, where the factual circumstances make the request reasonable, it is understood by the parties that the United States will honor and consent to a prior written request by defendant's counsel to be present when defendant provides cooperation to the United States.

The Obligations of the United States

14. If defendant enters a plea of guilty as described above and fully meets all obligations under this agreement, the United States will move to dismiss Counts 1-6, and 8 of the Indictment and he will not be further prosecuted by the United States Attorney's Office for the Western District of Oklahoma for any crimes arising from his

fraudulent activities while conspiring with former Deputy Commissioner of the Oklahoma State Department of Health Brent VanMeter from 1995 through August 2000. This agreement does not provide any protection against prosecution for any crime not specifically described above.

15. It is understood that the sentence to be imposed upon defendant is within the sole discretion of the Court. The United States does not make any promise or representation as to what sentence defendant will receive. The United States reserves the right to inform the Probation Office and the Court of (a) the nature and extent of defendant's activities with respect to this case and all other activities of defendant which the United States deems relevant to sentencing, and (b) the nature and extent of defendant's cooperation with the United States.

16. Further, the United States, in its sole discretion and by whatever means it deems appropriate, will evaluate defendant's cooperation in determining whether a motion for downward departure under §5K1.1 of the Sentencing Guidelines or a reduction of sentence under Rule 35(b), Federal Rules of Criminal Procedure is appropriate. It is understood that the decision whether to make such a motion is likewise solely within the discretion of the United States, and that a negative decision will not allow a guilty plea to be withdrawn.

Signatures

17. By signing this agreement, defendant acknowledges that he has discussed its terms with his attorney and understands and accepts those terms. Further, defendant acknowledges that this document contains the only terms of the agreement concerning his plea of guilty in

this case, and that there are no other deals, bargains, agreements, or understandings which modify or alter these terms.

Dated this 28th day of February, 2003.

APPROVED:

ROBERT G. McCAMPBELL
United States Attorney

/s/ Arlene Joplin
ARLENE JOPLIN
Chief, Criminal Division

/s/ Kerry A. Kelly
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/s/ E.W. Jiles
E.W. "DUB" JILES

/s/ Carl D. Hughes
CARL D. HUGHES
KYLE GOODWIN
Attorneys For Defendant

IN THE UNITED STATE DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	**PETITION TO ENTER PLEA OF GUILTY**
vs.	)	**NO. CR-03-29-C**
E.W. "Dub" JILES,	)	(Filed Mar. 3, 2003)
Defendant.	)	

The defendant states to the Court that the defendant wants to enter a plea of GUILTY to the following counts of the Indictment or Information: **Count 9 of the indictment.**

In connection with this plea of GUILTY, I, **E.W. "Dub" Jiles**, the defendant in this case, inform the Court, under penalty of perjury, that I have discussed these matters with my attorney and the answers to the following questions are true and correct to the best of my knowledge and belief:

A. BACKGROUND QUESTIONS:

Before the Court can accept your plea of guilty, it is necessary that the Court has certain background information about you and this case. The questions in this section are asked for this purpose.

1. (a) What is your name?

E.W. "Dub" Jiles

(b) What is your age?

Sixty-seven (67)

(c) What is your current home address?

1506 Buttram Rd.
Oklahoma City, Ok 73120

(d) What if you current home telephone number?

(405) 848-7800

2. Are you currently employed?

No. I am retired.

If yes, what is the name, address and telephone number?

3. How much education have you had?

Some College.

4. Have you even been under the care of a doctor or under treatment for drug addiction and/or alcohol abuse?

No.

If so, when are where? Not applicable.

5. Have you even been under the care of a doctor or under treatment for a mental or emotional condition?

No.

If so, when are where? Not applicable.

6. If an attorney is now representing you in this case, what is his or her name?

Carl Hughes, Kyle Goodman and
Sam Guiberson

7. If you have an attorney, have you had enough time to talk with your attorney about your case?

Yes.

8. If you have an attorney, have you told him or her everything you know about your case?

Yes.

9. If you have an attorney, are you satisfied with the job he or she has done for you?

Yes.

10. Do you understand the charge against you?

Yes.

B. CONSTITUTIONAL RIGHTS - WAIVERS

Before the Court can accept your plea of guilt it is important that you understand that you will be giving up many valuable constitutional rights by entering a plea of guilty. The questions in this section are designed to inform you of those rights.

11. Do you understand you have a right to plead NOT GUILTY to every charge filed against you?

Yes.

12. Do you understand that if you plead NOT GUILTY you have the following constitutional rights:

    (a) the right to a speedy and public trial by jury?

Yes.

(b) the right to counsel at all stages of the proceedings, and that if you cannot afford to pay a lawyer, one will be appointed to represent you?

Yes.

(c) the right to see and hear all witnesses called to testify against you and the right to cross-examine them?

Yes.

(d) the right to use the subpoena power of the Court to compel the attendance of witnesses at trial and the production of other forms of evidence?

Yes.

(e) the right not to be compelled to incriminate yourself by taking the witness stand; and that if you do no take the witness stand, no inference of guilt may be drawn from your failure to do so?

Yes.

(F) the right to be presumed innocent until the United States has proved you guilty beyond a reasonable doubt by the unanimous agreement of all 12 of the jury members?

Yes.

13. Do you understand that if you plead GUILTY you will be found guilty without a trial and you will have given up all of the above rights?

Yes.

14. Do you understand if you plead GUILTY to a felony offense this may deprive you of valuable civil rights including the right to vote, the right to hold public office, the right to serve on a jury, the right to possess

any kind of firearm, destructive device, or ammunition, and my make you ineligible for certain government benefits.

Yes.

C. SENTENCING - GENERAL

Before the Court can accept your plea of guilty, it is important you understand certain aspects of the sentencing process. The questions in this section are designed for that purpose.

15. Do you realize if you plead GUILTY the maximum statutory penalty that the Court may impose remains the same just as if you had pleaded NOT GUILTY and had been convicted by a jury?

Yes.

16. Do you know the sentence you will receive is solely a matter for the judge to decide?

Yes.

17. (a) What is the maximum punishment which the law provides for the offense or offenses to which you want to plead GUILTY?

Twenty (20) Years and
$500,000 fine

(b) Is there a minimum mandatory punishment which the law provides for the offense or offenses to which you want to plead GUILTY?

No.

If yes, what is it? Not applicable.

(c) For offenses occurring after November 1, 1987, the law provides a term of supervised release which may be imposed to run after release from a term of imprisonment. What is the maximum term of supervised release which could be imposed in this case?

Not greater then three (3) years.

What is the maximum term of imprisonment which cold be imposed if your supervised release were revoked?

Not more than two (2) years upon revocation.

(d) Will you be forfeiting any property to the United States as a result of your guilty plea?

Yes.

If yes, what property?

$4,046.50

18. If you plead GUILTY the judge may require you to make restitution to any victim of the offense (18 U.S.C. § 3579 [for pre-Guidelines violations], 3663, and 3664). If you plead GUILTY to an offense that occurred on or after April 24, 1996, and the offense falls into certain categories of offenses, including property offenses and crimes of violence, ordinarily the judge is required to order you to pay restitution to any victim of the offense (18 U.S.C. § 3663A). Do you understand all of this?

Yes.

19. Do you realize that if the crime charged occurred after November 11, 1984, and you plead GUILTY the judge

must require you to pay a mandatory special assessment? Where the offense is a felony committed before April 24, 1996, the special assessment will be $50.00 for each count charging such an offense, and if it is a felony committed on or after April 24, 1996, the assessment will be not less than $100.00 for each count charging such an offense. Where the offense is a misdemeanor classified as Class A, the special assessment will be $25.00 for each count charging such an offense.

Yes.

20. If you are on probation or parole in this or any other court, do you know that by pleading GUILTY here your probation or parole may be revoked and you may be require to serve time in that case in addition to any sentence imposed upon you in this case?

Yes.

21. If your crime was committed prior to November 1, 1987, do you understand if you are imprison as a result of your GUILTY plea, the Parole Commission in deciding when to place you on parole will take into account the ENTIRE Indictment, even if you are pleading GUILTY to less than all counts in the Indictment?

Yes.

22. Do you understand a federal judge may, under certain limited circumstances, order a federal sentence of imprisonment to run at the same time as a state sentence of imprisonment?

Yes.

23. Do you understand if you are convicted of a violation of Title 18, United States Code, Section 924(c), you will be required to serve that term of incarceration

prior to beginning the service of any other term of incarceration?

Yes.

D. SENTENCING GUIDELINE

Fill in this section *only* if the crime(s) to which you are pleading guilty were committed on or after November 1, 1987.

On November 1, 1987, a new sentencing law went into effect in the United States. This law established detailed sentencing guidelines which specify appropriate sentences for individuals convicted of federal crimes. In most cases, the sentencing judge must impose a sentence within the guideline range. Before the Court accepts your plea of guilty, it is important that you understand certain consequences of these guidelines.

24. The sentencing judge must select a sentence from within the guideline range. If, however, your case presents unusual features, the law permits the judge to depart from the guidelines and impose a sentence either above or below the recommended guideline range. Although most sentences will be imposed within the guideline range, there is no guarantee of this. Do you understand this?

Yes.

25. Parole has been abolished. Thus, if imprisonment is ordered in your case, the sentence imposed by the Court will be the sentence you will serve (less a maximum of 54 days per years for each year you serve as good time credit, if you earn it). Do you understand this?

Yes.

26. If more than one year of imprisonment, is ordered in your case, the Court must also impose a term of supervised release, which you will begin serving after you are released from custody. During the term of supervised release, you will be subject to conditions which will include refraining from any additional violations of local, state or federal law, reporting requirements, travel and residence restrictions, and testing for controlled substance use. If you violate the conditions of your supervised release, the Court may revoke your supervised release and sentence you to an additional term of imprisonment. This additional term of imprisonment would be served without credit for the time you successfully spent on supervised release. Do you understand this?

Yes.

27. The court is required to take into account all conduct, circumstances, and injuries associated with your criminal conduct, whether or not this conduct is charged by the Government in the crime to which you are pleading guilty.[1] Thus, the Court will consider all relevant conduct at the time of sentencing, even though you are pleading guilty to less than all counts in the Indictment. Do you understand this?

Yes.

28. Also, there is no limitation placed on the information the Court can consider at the time of sentencing concerning the background, character, and conduct of a person convicted of a crime so long as the information is reliable. The Court will take all of these factors into

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[1] *See* 18 U.S.C. § 3661, United States Sentencing Guidelines, § 1B1.8 and *United States v Marshall*, 59 F.Supp 751 (D. Wisc. 1981), *affd* 719 F.2d 887 (7th Cir. 1983).

consideration in determining an appropriate sentence. Do you understand this?

Yes.

29. An U.S. Probation Officer will be assigned to conduct a thorough presentence investigation to develop all relevant facts concerning your criminal conduct. Do you understand that if you tell lies to the U.S. Probation Officer this could increase or enhance your punishment under the guidelines?

Yes.

30. Your history of prior criminal convictions will be used to compute your Criminal History Category under the sentencing guidelines. If you have prior felony convictions which were imposed or on which you have served time within the past 15 years, your Criminal History Category may be increased. Similarly, if you have received misdemeanor convictions within the past 10 years, your Criminal History Category may be increased. Certain exceptions may apply in your case which would exclude a conviction from the Criminal History Category computation. Nonetheless, do you understand your prior criminal history has a direct impact on your sentence?

Yes.

31. Do you understand that if you committed the present offense(s) while you were on probation, parole, supervised release, or escape status, or within two years after being released from prison this will increase the number of points assessed in your criminal history computation. If this increases your Criminal History Category, do you understand it will increase your guideline sentencing range?

Yes.

32. Do you understand if you committed the present offense(s) as part of a pattern of criminal conduct from which you derived a substantial portion of your income, this may serve to increase your sentence under the guidelines?

Yes.

33. Do you understand if this offense is a crime of violence or a drug trafficking offense, and if you have two prior felony convictions of either a crime of violence or a drug trafficking offense, you could be sentence as a career criminal offender which would increase the punishment you receive to at or near the statutory maximum for the offense to which you are pleading?

Yes.

34. Do you understand straight probation, without any term of any type of confinement, is not available as an option for sentencing judge unless the lowest end of your sentencing guideline range is 0 months.

Yes.

35. Do you understand if you cooperate with the Government, provide substantial assistance to investigating authorities, and the Government files a written motion for departure downward from the recommended guideline range, that the Court is permitted to impose a sentence *below* the recommended guideline range?

Yes.

E. VOLUNTARY NATURE OF PLEA

36. Are your plea of GUILTY and the waivers of your rights made voluntarily and completely of your own

free choice, free of any force or threats or pressures from anyone?

Yes.

37. (a) Has any plea agreement been made by you with anyone which causes you to plead GUILTY?

Yes.

(b) If so, exactly what is that agreement, as you understand it? (Attach agreement as an exhibit.

Per written plea agreement.

(c) What are your reasons for making that agreement?

I'm guilty.

(d) If your plea of GUILTY involved a plea agreement, do you understand that the Court can reject the plea agreement after completion of the presentence investigation if the Court finds that the plea agreement is not in the interest of justice?

Yes.

38. Has any promise been made by anyone which causes you to plead GUILTY aside from the promise, if any, set out in your answer to question 37?

No.

39. (a) Has any officer, attorney or agent of any branch of the Government (federal, state or local) promised or predicted that you will receive a lighter sentence, or probation, or any other form of leniency if you plead GUILTY?

No.

(b) Do you understand no one has any authority to make any such promise or prediction on your sentence because the matter of sentencing is exclusively within the control of the judge and no on else?

Yes.

40. Has the judge made any suggestion as to what the actual sentence will be?

No.

41. Are you under the influence of kind of alcohol, medicine or drug which is, in the lease way, interfering with your ability to think clearly and understand exactly what you are doing in answering these questions?

No.

42. Are you pleading GUILTY for any reason other than the fact that you are guilty?

No.

43. Is there any other information or advice that you want before you enter a plea?

No.

F. CONCLUSION/FACTUAL BASIS

44. Has your attorney gone over all of these questions and your answers to them?

Yes.

45. Do you understand all of these questions?

Yes.

If no, which ones don't you understand. Not applicable.

46. (a) Do you want to plead GUILTY?

Yes.

(b) Are you GUILTY?

Yes.

47. What act or acts did you do to commit the offense or offenses to which you are now pleading GUILTY?

I bribed Brent VanMeter and helped him launder bribe money through the KIS account to effect appointment of temporary managers, all during the period of indictment.

I understand that if I have knowingly and intentionally made any false answers in this petition, my answers may be used against me in another prosecution for perjury or making a false statement [*See* Fed. R. Crim. P. 11(c)(5)].

Signed by me in the presence of my attorney this 28th day of February, 2003, and affirmed to be true under penalty of perjury in the presence of my attorney on this 28th day of February, 2003.

/s/ E.W. Jiles
E.W. "Dub" Jiles, Defendant

CERTIFICATE OF DEFENSE COUNSEL

I, as attorney for the defendant, E.W. "Dub" Jiles, hereby certify that:

1. I have read and fully explained to the defendant the allegations contained in the indictment or Information in this case.

2. To the best of my knowledge and belief the statements, representations, and declaration made by the defendant in the foregoing are in all respects accurate and true.

3. The plea of guilty offered by the defendant to **Count 9** of the indictment accords with my understand of the facts the defendant has related to me, is consistent with my advice to the defendant, and in my opinion is voluntarily and understandingly made.

4. For all offenses which occurred on or after November 1, 1987, to which the defendant has entered a plea of guilty, I assure the Court that I have advised the defendant about the sentencing procedure under the Sentencing Guidelines and have explained to the defendant the potential consequences of his plea of guilty in light of the questions and concerns set forth in Section D of this Petition.

Signed by me in the presence of the defendant and after full discussion of the contents of this certificate with the defendant, this 28th day of February, 2003.

/s/ [Illegible]
Attorney for Defendant

CERTIFICATE OF PROSECUTING ATTORNEY

As attorney for the Government, I hereby certify that:

1. I have read and fully discussed with defense counsel the allegations contained in the indictment or Information in this case.

2. I have also reviewed this Petition to Enter a Plea of Guilty and find it to be in accordance with my knowledge of the defendant and this case.

3. To the best of my knowledge and belief the defendant in this case is pleading guilty to a charge which adequately reflects the seriousness of the actual offense behavior and the relevant conduct of the defendant as defined by the U.S. Sentencing Commissions (*See, e.g.*, U.S. Sentencing Guidelines § 1B1.3).

4. In my judgment, acceptance of the defendant's plea of guilty to the charges in questions will not undermine the statutory purposes of sentencing.

Signed by me this 28th day of February, 2003.

/s/ Kerry A. Kelly
Attorney for the
Government

(2)

Supreme Court, U.S.
FILED
AUG 23 2004
OFFICE OF THE CLERK

No. 04-208

In the Supreme Court of the United States

E.W. JILES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

In the Supreme Court of the United States

No. 04-208

E.W. JILES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that his sentence under the federal Sentencing Guidelines was imposed in violation of the rule announced in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). This Court has granted certiorari in *United States* v. *Booker*, No. 04-104 (Aug. 2, 2004), and *United States* v. *Fanfan*, No. 04-105 (Aug. 2, 2004), to consider whether *Blakely* applies to the federal Sentencing Guidelines, and, if so, how federal sentencing should be conducted in light of such a conclusion. If the Court were to hold that *Blakely* applies to the Guidelines, the proper disposition of petitioner's claim could be affected by such a holding (as well as by any applicable doctrines of waiver, forfeiture, and harmless error). Accordingly, the petition for a writ of certiorari should be held pending this Court's decisions in *Booker*

and *Fanfan*, and then disposed of as appropriate in light of the decisions in those cases.*

PAUL D. CLEMENT
Acting Solicitor General

AUGUST 2004

* The government waives any further response to the petition unless this Court requests otherwise.